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Supreme Court of the United States

October 1955 Term

No. 72

FRANK COSTELLO,

Petitioner,

—vs.—

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

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We are acutely mindful of the burden undertaken by this petition for rehearing in view of the fact that the decision rendered on March 5, 1956 was by an undivided Court. We believe, however, that we can demonstrate that the Court has decided a question not posed in this case, and having decided this much broader question it assumed that the question posed was also disposed of. We respectfully submit that the Court has not decided the question on which it granted certiorari.

I.

The Court has decided broadly that justice would be delayed if defendants were allowed "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury". But this question, although related to the one argued by petitioner, is not determinative of this case. The question posed by peti-

tioner did not rest on the refusal to grant him a preliminary hearing. His contention rested entirely on the fact, determined without any preliminary hearing, that there was no competent evidence whatever before the grand jury.

We do not overlook the Court's concern that procedural difficulties might arise if a pre-trial inquiry into grand jury proceedings were permitted. But we suggest that that concern has no place where, as here, the facts were established without any such preliminary hearing.

It is no answer to say to this petitioner that he was legally indicted on incompetent evidence because to ascertain the facts in some other case might entail unnecessary delay. Whatever hesitancy may be indicated in the authorities as to the right to have such preliminary hearing, we know of no previous authority which sanctions an indictment clearly shown to have rested on wholly incompetent evidence. The very case, *United States* v. *Reed*, 27 Fed. Cas. 727, quoted from in the Court's opinion, goes on to say at page 735 that "Evidence before a grand jury must be competent, legal evidence, such as is legitimate and proper before a petit jury".

Surely in making this statement Mr. Justice Nelson was not making an idle gesture. While the *Reed* case may lend support to the broad view taken by the Court with regard to preliminary inquiry, it is not a precedent for the actual decision of the case at bar and is in fact in conflict with it, because competent evidence was before the grand jury there.

Similarly, in *Holt* v. *United States*, 218 U. S. 245, the question was whether the courts would weigh the evidence

before a grand jury to determine whether the presence of some incompetent evidence along with competent evidence invalidated the indictment. The Court decided (p. 248) that "The abuse of criminal practice would be enhanced if indictments could be upset on such a ground", namely, that incompetent evidence "had been considered along with the rest".

Thus, in neither the *Reed* case nor the *Holt* case was there any anticipation of the question which this Court permitted to be brought here on certiorari.

II.

As appears from the Court's opinion, it arrived at its conclusion because of a belief that to afford a defendant an opportunity to question the adequacy or competency of the evidence before the grand jury would result in interminable delay. But this case should prove the contrary. When the defendant here made his motion addressed to the indictment it would have taken less than an hour for the court to examine the minutes and ascertain what has now been found to be the fact, that there was no competent evidence before the grand jury. Such holding could have resulted in immediate reindictment on the basis of evidence such as was produced at the trial. Congress has even extended the statute of limitations to take care of such situations. (See 18 U. S. C. 3288.)

III.

The Court has further decided to rest its decision not only on the constitutional point but also on policy consid-

erations, and has used the same argument with regard to delay in dealing with these.

With respect to the policy question, the actual choice is between requiring a defendant to suffer the indignity, expense and risk of a criminal trial when the grand jury had no evidence before it which could have justified an indictment, and the possible short delay which might result in securing a reindictment if competent evidence is available. When the problem is viewed in this light the choice must be in favor of the individual rather than in favor of the prosecution.

This should be particularly so since any delay entailed in reindictment will have resulted from the acts of prosecutors in not presenting competent evidence, if available, in the first instance. Clearly, in the absence of such evidence a prosecution should not have been considered, much less pressed to indictment. *And if competent evidence is available, no valid reason has been advanced why the evidence should not be presented to the grand jury.* Any possible delays can be dealt with by a rule requiring the motion to be made within a fixed period of time after indictment and holding a defendant to a strict burden of establishing a basis for his contention.

But in no event can it be said that a policy consideration justifies subjecting a defendant to a trial upon an indictment which rests on *nothing* merely because later at the trial sufficient competent evidence may be produced. An indictment without evidence has no greater basis than an indictment by a grand jury from which members of defendant's race have been systematically excluded. This Court has never condoned an indictment obtained under

such circumstances merely because the proof at the trial was sufficient to convict, nor because delay might result from a hearing at which the facts were established, as in *Avery* v. *Georgia*, 345 U. S. 559; *Hernandez* v. *Texas*, 347 U. S. 475. (And compare search and seizure cases such as *Johnson* v. *United States*, 333 U. S. 10; *United States* v. *Jeffers*, 342 U. S. 48 and confession cases: *Stein* v. *New York*, 346 U. S. 156; *Leyra* v. *Denno*, 347 U. S. 556.)

In all these situations the delays are much more considerable than would normally be the case in an attack on an indictment. For they usually involve a hearing and conflict of testimony; in our situation a reading of the grand jury minutes will suffice. Fear of delay did not deter this Court when confronted with the situation disclosed in *Remmer* v. *United States*, 347 U. S. 227; 350 U. S. (decided March 5, 1956).

IV.

The rule suggested by the court below and urged by Mr. Justice Burton in his concurring opinion would call for some examination of the evidence before the grand jury. That examination would determine not the competency of the testimony but merely whether it was rationally relevant. Of course were such an examination permitted it might just as well, so far as time delay is concerned, be used to determine whether competent evidence was produced. It appears to us that in the Court's desire to avoid delays it was driven to the extreme position that under no circumstances could inquiry be made as to the basis upon which a grand jury acted. This extreme position renders wholly meaningless the constitutional provision.

The Court's decision authorizes a prosecutor to state to a grand jury in effect: "I have no evidence whatsoever but nameless agents or faceless informers tell me that defendant is guilty. You indict and then I will seek evidence to prove guilt." If a grand juror should express reluctance to proceed without evidence, the prosecutor could cite the Court's opinion here as authority for the prosecutor's procedure. Under the Court's ruling an indictment so founded would not be subject to attack. This is shocking and inconceivable. No prosecutor and no grand jury should have such unrestrained power.[1]

V.

The Court stressed the fact that in England the grand jury had "acquired an independence". This, however, was at a time when prosecutions were initiated by the private parties aggrieved and there were not, as has become the case almost universally in this country, professional public prosecutors. Almost every survey of the grand jury as an institution, at least in this century, has come to the conclusion that the grand jury is but a rubber stamp ready to indict when the professional prosecutor asks it to. Excerpts to this effect from such surveys appear in an Appendix to this petition.

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[1] What a Roman holiday for politically minded or unscrupulous prosecutors!

Overzealous prosecutors could obtain indictments against *all* suspects and later select one of them as a defendant for trial if the evidence "develops". This procedure could be used to extend statutes of limitations. The period could be extended even further without the defendant's knowledge by the use of sealed indictments. See Rule 6(e), Rules of Criminal Procedure; *United States* v. *Michael*, 180 F. 2d 55, 56, cert. den. 339 U. S. 978; *United States* v. *Onassis*, 125 F. Supp. 190, 212.

VI.

The rule which the Court has adopted might conceivably be justified if it were one of necessity, but no showing has been made to this Court of such necessity, nor of the experience in other jurisdictions which do permit inquiry. There has been no suggestion that unnecessary delays have resulted. Nor has there been any showing that indictments have customarily been based on incompetent evidence.[2] Experience would seem to indicate that this has not been the case because in all the years it is only now that the question has arisen in this Court. And as the briefs of the parties show, the number of reported instances in other jurisdictions has been small.

The experience of the Department of Justice as to the practices employed by prosecuting attorneys and grand juries in the many districts should be ascertained before this Court makes so drastic and final a rule which renders the constitutional requirement for grand jury indictment meaningless.

VII.

We believe that the English practice referred to by the Court rather supports our position than the Court's conclusion. In the first place, the fact that grand jurors sometimes acted on their own knowledge does not support the view that incompetent evidence is sufficient to justify an indictment, for the factual statements made by a grand

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[2] The Court erroneously assumed that petitioner was suggesting a "change" in the basis for indictments. Actually the Court's decision will be considered by prosecutors as a change in the rule that competent evidence should be submitted to grand juries.

juror (who is under oath) to his fellow grand jurors is the equivalent of testimony of an outside witness and is, of course, competent evidence.

The important aspect of English practice, however, is that in 1933 the grand jury was abolished so that prosecution for serious crime may proceed ordinarily[3] only after a hearing before a magistrate, in the presence of the accused, at which witnesses are sworn, examined and cross examined (5 Halsbury, Statutes of England, p. 1065 ff. id.; p. 674). Thus the current English practice now gives a prospective defendant even greater protection than before the abolition of the grand jury. It certainly is no authority for depriving a prospective defendant in our country of at least the protection of having competent evidence presented to the grand jury in his absence.

VIII.

Simultaneously with the filing of this petition for rehearing, petitioner is filing a motion for leave to file a petition for the enlargement of the scope of review in the order granting certiorari entered October 10, 1955. Since the rules of this Court appear to make no specific provision for the filing at this time of such petition even when based on "intervening circumstances of substantial or controlling effect" (Rule 58 Subdivision 2), we alternatively request that if a rehearing be granted that the order granting such rehearing also allow an enlargement of the scope of

[3] In some circumstances a Judge may order a prosecution by indictment without a prior commitment by a magistrate.

review as prayed for in the accompanying separate petition to that end.

Respectfully submitted,

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Attorneys for Petitioner

MORRIS SHILENSKY, one of counsel for petitioner, hereby certifies that the above application is made in good faith and not for the purpose of delay.

Dated: New York, N. Y.,
March 28, 1956

MORRIS SHILENSKY

APPENDIX

Grand Jury as Rubber Stamp of Prosecutor

1. "Generally the grand jury does little more than rubber stamp the opinion of the prosecutor. It is almost exclusively dependent upon him for its knowledge of the law, and for its information on the facts; it is almost entirely dependent on his zeal and willingness."

   Alfred Bettman, *Criminal Justice in Cleveland* (1923) 212.

2. "Every prosecutor knows, and every intelligent person who ever served on a grand jury knows, the prosecuting officer almost invariably completely dominates the grand jury . . . The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of propriety and justice."

   Illinois Crime Survey (1929) 299.

3. "In most cases it is not true that much independent judgment is exercised by grand juries. In the short time which they have to consider the cases which are placed before them, and especially as they hear only one side of the evidence, they are practically forced to accept the judgment of the prosecuting attorney, consciously or unconsciously expressed."

   Miller, "Informations or Indictments in Felony Cases" 8 *Minn. L. Rev.* 379, 397-8 (1924) and the letters from prosecutors in footnotes 76, 78.

4. "From this original high purpose the grand jury has now come to be a group of men, seldom the best

men in the community and frequently far below the average, who function under the dictation of the prosecutor. It is a mere rubber stamp for the prosecutor, and a means by which he is able to escape specific responsibility for his actions."

"It is easy to understand the substantial truth in the average prosecutor's comment that 'I shall indict', or, 'I shall not indict.' In a process which usually depends entirely on matters of legal definition, the sole legal adviser of the civilian grand jury is able to have his way in nearly every case."

Raymond Moley, *Politics and Criminal Prosecution* (1929) 127, 143.

5. "Moreover, the grand jury is, in practice, mere clay in the hands of the prosecuting officer. He, in practice, determines what witnesses shall be called, conducts the examination of witnesses, and advises the grand jury as to the law. He has it in his power to make a case appear stronger than it is, or weaker, or to defeat it by an adverse opinion as to the law, and this absolutely without responsibility to the public. The grand jury simply serves to shield him from a responsibility that he ought to bear."

Heman W. Chaplin, "Reform in Criminal Procedure" 7 *Harv. L. Rec.* 189, 191 (1893).

Appendix

6. From Morse, 10 *Oregon L. Rev.* 304, 305:

"QUESTIONS IX AND X

To what extent do grand juries return indictments when they are not recommended by the prosecutor?

To what extent do grand juries refuse indictments recommended by prosecutors?

Table XXX

JUDGES' OPINIONS AS TO EXTENT GRAND JURIES RETURN INDICTMENTS NOT RECOMMENDED BY PROSECUTOR

(Classified by Types of States and Types of Courts)

Judges' Opinions	Judges in Indictment States			Judges in Information States			Total
	Supreme Court Justices	Trial Court Judges	Judges of Courts of Limited Jurisdiction	Supreme Court Justices	Trial Court Judges	Judges of Courts of Limited Jurisdiction	
Very small extent	9	196	52	2	22	5	286
Large extent	0	12	0	0	0	0	12
No extent	5	3	0	6	18	9	41
Depends on prosecutor	0	0	0	0	2	0	2
Did not know or failed to answer	9	53	45	8	83	6	204
Total	23	264	97	16	125	20	545

Appendix

Table XXXI

JUDGES' OPINIONS AS TO EXTENT GRAND JURIES REFUSE INDICTMENTS RECOMMENDED BY PROSECUTOR

(Classified by Types of States and Types of Courts)

Judges' Opinions	Judges in Indictment States			Judges in Information States			Total
	Supreme Court Justices	Trial Court Judges	Judges of Courts of Limited Jurisdiction	Supreme Court Justices	Trial Court Judges	Judges of Courts of Limited Jurisdiction	
Very small extent ...	10	195	47	4	29	4	289
Large extent	0	14	0	0	0	0	14
No extent	4	3	0	3	27	5	42
Depends on prosecutor	0	0	0	0	2	0	2
Did not know or failed to answer	9	52	50	9	67	11	198
Total	23	264	97	16	125	20	545

* * * * *

"The outstanding feature of Tables XXX and XXXI is that so many judges in indictment states replied that grand jury decisions to only a small extent vary materially from the recommendations of prosecutors."